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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN RAMOS,

Defendant and Appellant.

B292943

(Los Angeles County
Super. Ct. No. LA088406)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph A. Brandolino, Judge. Affirmed and remanded.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, David E. Madeo and Nancy Lii Ladner, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Martin Ramos pleaded no contest to one count of unlawful possession of ammunition (Pen. Code, § 30305, subd. (a)(1))¹ and admitted a prior felony conviction. He was sentenced to the low term of 16 months in state prison.

Ramos contends the trial court erred in denying his pretrial motion to suppress evidence of a bullet discovered in a pat-down search of his clothing. Specifically, he argues a clothing pat down that officers conducted after handcuffing him was an unreasonable search because he did not pose a threat to officer safety at that time, and the search was not incident to arrest. The Attorney General asserts that the pat-down search was reasonable both as an investigative search for officer safety and as a search incident to lawful arrest. In supplemental briefing, Ramos contends that the trial court's imposition of assessments under Government Code section 70373 and Penal Code section 1465.8, subdivision (a)(1), and a restitution fine under Penal Code section 1202.4, subdivision (b), was unconstitutional because it failed to make a determination that he had the ability to pay the assessments and fine. Ramos requests that we remand the matter to the trial court to afford him the opportunity to request an ability to pay hearing under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

We remand the matter for the limited purpose of allowing Ramos to request an ability to pay hearing, but otherwise affirm the judgment.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

FACTS AND PROCEDURAL HISTORY²

Ramos's Search and Arrest

At approximately 8:35 a.m. on May 17, 2018, Los Angeles Police Officer Varoj Vaidhayakul responded to a call from a security guard that multiple people were inside an abandoned building where transients were known to break in and congregate. When officers entered the building they observed Ramos and another individual exiting one of the bedrooms. Officer Vaidhayakul “immediately put handcuffs on [Ramos] and did a pat down [*sic*] search on the rear area where his handcuffs are to be placed.” The officer testified that he took these actions for officer safety because, in his experience, “[t]ransients are known to carry knives.” Officer Vaidhayakul limited this initial pat down to Ramos’s rear waistband and rear pants’ pocket, because those were the areas that Ramos could access with his hands handcuffed behind his back. The officer recovered a pocket knife from Ramos’s rear pants’ pocket. The officer then moved Ramos outside because the building was filled with “hazardous materials,” “[t]here was urine [and] feces all over the place,” and the officer did not want to continue inhaling waste.

Once outside, Officer Vaidhayakul “conducted the rest of the pat down [*sic*] search consisting of the rest of [Ramos’s] body.” The officer felt a hard cylindrical object approximately three inches long in Ramos’s right front pocket. Based on his training,

² The statement of facts is based on the preliminary hearing testimony.

he formed the opinion that the object was a pipe for smoking methamphetamine.³ When he reached into the pocket to remove the object, he felt another cylindrical object with a cold tip, which he believed to be a bullet based on his training and experience. He removed the object, which was a bullet. The officer patted down Ramos's left front pocket and felt a third cylindrical object which he believed to be narcotics paraphernalia. He retrieved a broken glass smoking pipe. During the pat-down search, the officer also discovered a baggie containing a substance that resembled methamphetamine.

After Officer Vaidhayakul completed the pat-down search, he ran a wants and warrants check on Ramos and pulled up his "rap sheet," which revealed that Ramos had been convicted of possessing a loaded firearm. The officer placed Ramos under arrest for "ex-con with possession of ammo." Ramos's handcuffs were not removed at any point during the search.

The Motion to Suppress

Ramos filed a pretrial motion to suppress evidence of the bullet, which was heard at the preliminary hearing. The trial court denied the motion, finding the search was incident to lawful arrest because the officers had probable cause to arrest Ramos for trespassing at the time of the search. Ramos was thereafter charged with unlawful possession of ammunition. (§ 30305, subd. (a)(1).)

³ The officer believed the cylindrical object was in fact a small flashlight, but testified that he could not remember for certain.

Ramos renewed his motion to suppress before the trial court. He argued the search was unreasonable because: (1) he could not reach his front pockets while handcuffed and was therefore not a threat to officer safety; (2) there was not probable cause to arrest him for trespassing because there was no evidence that someone had a proprietary interest in the abandoned building; and (3) the officer never articulated that the search was incident to the arrest.

The trial court denied the motion. The court disagreed that a search for the purpose of officer safety must be confined to a person's back pockets when they are handcuffed—items may fall out of a person's pockets or may be sharp and capable of causing injury regardless of their location on the body. The court found that the continued pat down for safety reasons satisfied *Terry v. Ohio* (1968) 392 U.S. 1 (*Terry*). The court also found the pat down was a lawful search incident to arrest for trespassing. There was probable cause to believe that Ramos was trespassing based on the security guard's report that people had broken into an abandoned building and were remaining there without permission, and based on the scene when the officer arrived. The state of the building suggested that the persons inside were using it without permission. The court did not interpret the term "abandoned" to mean that no one held a proprietary interest in the building, only that no one was occupying the building at the time.

Ramos entered a no contest plea, admitted a prior felony conviction, and was sentenced.

He timely appealed the denial of the motion to suppress.

DISCUSSION

Unreasonable Search and Seizure

Ramos appeals denial of his motion to suppress evidence on the basis that the second pat down, which occurred outside of the building after he was handcuffed, exceeded the scope of *Terry* because: (1) Ramos could not reach his front pockets and was not a threat to officer safety; (2) there was no probable cause to arrest him for trespassing because no one had a proprietary interest in the abandoned building; and (3) the search was not incident to lawful arrest because the officer arrested Ramos for ex-felon in possession of ammunition after discovering the bullet and did not arrest him for trespassing.

““An appellate court’s review of a trial court’s ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] ‘The [trial] court’s resolution of each of these inquiries is, of course, subject to appellate review.’ [Citations.] [¶] The court’s resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review.” [Citation.]” (*People v. Ayala* (2000) 23 Cal.4th 225, 255.)

We conclude that Officer Vaidhayakul's pat-down search of Ramos was justified for purposes of officer safety, which led to the discovery of contraband, including the bullet, through plain touch. Upon stopping Ramos, Officer Vaidhayakul was authorized to make a protective pat-down search for weapons "reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." (*Terry, supra*, 392 U.S. at p. 29.) "If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context." (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 375–376, fn. omitted.)

Officer Vaidhayakul testified that he conducted the pat-down search for weapons based on his knowledge and experience that transients often carried knives, and based on his concern for officer safety. The initial, limited pat down of Ramos's rear waistband and pockets, covering the areas Ramos could reach while handcuffed, revealed that Ramos was carrying a pocketknife in one of his back pockets. After discovering the knife, Officer Vaidhayakul reasonably removed himself and Ramos from a noxious environment, and immediately completed the pat down of Ramos's person for other weapons or instruments for assault. We share the trial court's view that, knowing from experience that transients often carry knives, and having already discovered one knife in Ramos's possession, it was reasonable for the officer to continue the external pat-down search to verify that there were no additional weapons or instruments on Ramos's

person. We also share the view that the fact that Ramos was handcuffed did not remove the danger that he could utilize a weapon carried in his front pockets—items can fall or be knocked out of pockets, they can be retrieved when handcuffs are removed, and weapons like knives can have sharp edges that are capable of causing injury even if a suspect does not wield them with his hands. When Officer Vaidhayakul felt an object that he believed through his experience and training was used for ingesting narcotics, he had cause to retrieve the incriminating object.⁴ When he felt another object that he recognized as a bullet through touch—again as a result of experience and training—the officer had sufficient justification to retrieve it as well.

Officer Vaidhayakul also had probable cause to search Ramos incident to lawful arrest. “Probable cause exists when the facts known to the arresting officer would persuade someone of “reasonable caution” that the person to be arrested has committed a crime. [Citation.] “[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts” [Citation.] It is incapable of precise definition. [Citation.] “The substance of all the definitions of

⁴ “[T]he determination that the incriminating nature of an item was ‘immediately apparent’ [is] based upon whether the officers had probable cause to believe that the item was either evidence of a crime or contraband.” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1294.) Ramos does not argue that Officer Vaidhayakul lacked probable cause to believe the item that caused him to put his hand in the pocket containing the bullet was contraband or that he lacked probable cause to believe the bullet itself was contraband.

probable cause is a reasonable ground for belief of guilt,” and that belief must be “particularized with respect to the person to be . . . seized.” [Citation.]’ [Citation.]” (*People v. Scott* (2011) 52 Cal.4th 452, 474.)

“To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide ‘whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to’ probable cause, [citation.]” (*Maryland v. Pringle* (2003) 540 U.S. 366, 371.) In this case, officers responded to a report from a security guard that multiple people had been observed breaking into and entering an empty building where transients are known to congregate. The fact that a guard employed to patrol the area reported the possible criminal activity could lead a reasonably objective officer to believe that the building had, in fact, been entered by a person or persons against the owner’s wishes. When Officer Vaidhayakul entered the building it was in a squalid and disarrayed state, which also created a strong inference that it was being used by people who were trespassing.

It is not necessary that an officer be able to prove all of the elements of a crime were actually met—he or she has only to show that to a person of “reasonable caution” it would appear that there was sufficient evidence to believe the defendant committed a crime. Here, a person of “reasonable caution” would have probable cause to believe that Ramos was trespassing. Nothing that occurred during the pat down altered the reasonableness of this conclusion. The fact that Ramos was ultimately arrested for a more serious crime rather than trespass does not change our conclusion. There was never a point in the

search at which Ramos could not have been arrested for trespassing, and, faced with evidence of multiple crimes, the officer had discretion to arrest Ramos on the basis of any crime for which probable cause existed.

Ability to Pay Assessments and Fines

At sentencing, the trial court imposed a \$30 court facilities assessment (Gov. Code, § 70373), a \$40 court operations assessment (§ 1465.8, subd. (a)(1)), a \$300 restitution fine (§ 1202.4, subd. (b)), and a suspended \$300 parole revocation fine (§ 1202.45, subd. (a)). Ramos did not request a hearing to determine whether he had the ability to pay these assessments and fines.

Ramos asserts that he is indigent, as demonstrated by the evidence of his homelessness at trial and the fact that he was represented by a court-appointed attorney at trial and on appeal. Ramos also asserts that he was unemployed prior to incarceration, that his earning capacity in state prison is severely limited, and that nothing in the probation report suggests an ability to pay. He argues that the trial court's failure to determine whether he had the ability to pay the assessments and fines prior to their imposition violated his constitutional rights to due process and equal protection under *Dueñas, supra*, 30 Cal.App.5th 1157, which applies to his case retroactively. He claims that he did not forfeit his contention on appeal, as counsel could not have been expected to anticipate the change in law wrought by *Dueñas*, which places the burden on the prosecution to establish a present ability to pay even mandatory fines. Ramos requests that we strike the court operations and court

facilities assessments, and stay execution of the restitution fine unless and until the People prove that he has the present ability to pay the fine, as the Court of Appeal in *Dueñas* did.

The Attorney General argues that Ramos forfeited his contention by failing to raise it below under the ordinary rules of appellate procedure, and that his constitutional concerns do not require deviation from that rule. The Attorney General asserts that the change in law was foreseeable because existing law at the time did not foreclose the challenge or the specific basis for objection. Even if the contention is not waived, the People contend that application of *Dueñas*, and, in particular, any rule that it has announced placing the burden of proof on the prosecution, is inappropriate because Ramos has not demonstrated that he is unable to pay or that he will suffer additional penalties due to his poverty, thereby shifting the burden of proof as *Dueñas* did.

We conclude that the contention was not forfeited. *Dueñas* had not been decided when Ramos was sentenced, and no California court had held that due process and/or equal protection required a court to determine a defendant's ability to pay before imposing fines, fees, or assessments. The imposition of the \$30 court facilities assessment (Gov. Code, § 70373) and \$40 court operations assessment (§ 1465.8, subd. (a)(1)) at issue here were mandated by statute without exception. The statute providing for the restitution fine imposed upon Ramos also required imposition, and additionally precluded consideration of a defendant's ability to pay where the minimum fine of \$300 was imposed, as it was in this case. (§ 1202.4, subd. (c).) Forfeiture is excused “when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated

the change.’ (*People v. Turner* (1990) 50 Cal.3d 668, 703; see *In re Gladys R.* (1970) 1 Cal.3d 855, 861; *People v. De Santiago* (1969) 71 Cal.2d 18, 23; *People v. Kitchens* (1956) 46 Cal.2d 260, 263.)” (*People v. Black* (2007) 41 Cal.4th 799, 810.) We view this as a case in which excusal of forfeiture is appropriate.⁵

The merits of Ramos’s claim require thorough consideration of *Dueñas*, as its conclusions have the potential to carry implications that reach more broadly than the circumstances of that case required. In *Dueñas*, the record established that the defendant was a homeless, jobless mother of two children, whose husband was also frequently unemployed. Dueñas was caught in a longstanding cycle of poverty that had been exacerbated by fines she accrued by driving with a suspended license. Dueñas had repeatedly served time in jail in lieu of paying fines because of her inability to pay, and had suffered other severe adverse consequences due to nothing more than her own impoverishment. In the matter before the Court of Appeal, Dueñas had requested, and the trial court had granted, a hearing to determine her ability to pay a \$30 court facilities assessment (Gov. Code, § 70373), a \$40 court operations assessment (§ 1465.8, subd. (a)(1)), and a \$150 restitution fine (§ 1202.4, subd. (b)), as well as

⁵ We do not categorically reject forfeiture in cases where a defendant failed to object on the basis of an inability to pay. For instance, where the trial court imposes a restitution fine that is above the statutory minimum, section 1202.4, subdivision (c) expressly permits consideration of the defendant’s ability to pay. (See § 1202.4, subd. (c) [“[i]nability to pay may be considered . . . in increasing the amount of the restitution fine in excess of the minimum fine pursuant to paragraph (1) of subdivision (b)”].)

previously imposed attorney fees.⁶ (*Dueñas, supra*, 30 Cal.App.5th at pp. 1161–1162.) Dueñas presented undisputed evidence of her inability to pay, and the trial court waived the attorney fees. However, the court was statutorily required to impose the court facilities assessment and court operations assessment, and prohibited from considering her inability to pay as a “compelling and extraordinary reason[]” that would permit waiver of the minimum restitution fine. (*Id.* at p. 1163.) It therefore imposed the assessments and fine despite its finding that Dueñas was unable to pay them. (*Ibid.*)

The Court of Appeal held that the consequences Dueñas faced amounted to punishment on the basis of poverty, which the state and federal constitutional rights to due process and equal protection forbid. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1166–1172.) The court’s decision was rooted in the well-established constitutional principles that “allow no invidious discriminations between persons and different groups of persons” and prohibit “inflict[ing] punishment on indigent convicted criminal defendants solely on the basis of their poverty.” (*Id.* at p. 1166.) Specifically, the Court of Appeal stated: “As legislative and other policymakers are becoming increasingly aware, the growing use of . . . fees and similar forms of criminal justice debt creates a significant barrier for individuals seeking to rebuild their lives after a criminal conviction. Criminal justice debt and associated collection practices can damage credit, interfere with a defendant’s commitments, such as child support obligations,

⁶ A \$150 restitution fine is the minimum that may be imposed upon a misdemeanor. (§ 1202.4, subd. (b)(1).)

restrict employment opportunities and otherwise impede reentry and rehabilitation. “What at first glance appears to be easy money for the state can carry significant hidden costs—both human and financial—for individuals, for the government, and for the community at large. . . . [¶] . . . Debt-related mandatory court appearances and probation and parole conditions leave debtors vulnerable for violations that result in a new form of debtor’s prison. . . . Aggressive collection tactics can disrupt employment, make it difficult to meet other obligations such as child support, and lead to financial insecurity—all of which can lead to recidivism.” [Citations.]’ (*People v. Neal* (2018) 29 Cal.App.5th 820, 827.) [¶] These additional, potentially devastating consequences suffered only by indigent persons in effect transform a funding mechanism for the courts into additional punishment for a criminal conviction for those unable to pay.” (*Duenas, supra*, 30 Cal.App.5th at p. 1168.) The appellate court reversed the trial court’s order imposing the court facilities assessment and court operations assessment and directed the trial court to stay the execution of the restitution fine unless and until the People proved that Dueñas had the present ability to pay it. (*Id.* at p. 1173.)

The *Dueñas* court concluded that due process requires trial courts to determine a defendant’s ability to pay before it may impose the assessments mandated by Penal section 1465.8 and Government Code section 70373, and requires trial courts to stay execution of any restitution fine imposed under Penal Code section 1202.4 until it has been determined that the defendant has the ability to pay the fine. These conclusions were not necessary to the resolution of the case, as the trial court had granted Dueñas’s request for a hearing to determine her ability

to pay the fine and assessments and held the hearing before they were imposed. (See *Association for Los Angeles Deputy Sheriffs v. Superior Court* (2017) 13 Cal.App.5th 413, 443, quoting *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620 [“[a]n appellate decision is not authority for everything said in the court’s opinion but only “for the points actually involved and actually decided””].) In the wake of *Dueñas*, these conclusions have spurred numerous defendants to challenge imposition of fines, fees, and assessments in the absence of an ability to pay hearing, even where the defendant did not request a hearing and the record bears no indication that waiver of these fines, fees, and assessments would be appropriate.

The harm that caused Dueñas’s situation to rise to the level of a constitutional violation was the application of the statutes imposing fines, fees, and assessments, in the face of undisputed evidence that she was unable to pay and would undoubtedly suffer penalties based solely on her indigence. There is no similar harm suffered by the many defendants who are able to bear these costs without enduring additional penalties, and we cannot conclude that the constitution requires extending the concepts expressed in *Dueñas* to afford all defendants an ability to pay hearing regardless of whether there is evidence that waiver of fines, fees, and assessments may be warranted. We do believe that there are defendants such as Ramos, who are in sufficient danger of suffering penalization on the basis of poverty,

for whom remand for the opportunity to request an ability to pay hearing is the most just and prudent resolution, however.⁷

How such a determination may be reached appears to us to be a question of fact that will vary significantly depending on the circumstances of each case. Here, we base our decision on the uncontested fact of Ramos’s homelessness as evidenced by the record and the very short imposed sentence of 16 months, during which he can hope to earn only a limited amount of money from his prison wages. We also agree with Ramos that nothing in the probation report suggests he has an ability to pay. We do not suggest that Ramos may not ultimately be adjudged by the trial court to be able to pay all or part of the fines, fees, and assessments imposed. We decide only that, in our judgment, the facts on record indicate that he may be eligible for waiver, and in light of the potential constitutional concerns presented, that is sufficient reason to justify remand.

On remand, the burden is on Ramos to establish his indigence. We reject Ramos’s assertion that *Dueñas* placed the burden of proving ability to pay on the prosecution. *Dueñas*’s statement that the prosecution presented no evidence of the defendant’s ability to pay must be viewed in light of the fact that

⁷ The Attorney General does not appear to dispute that, to the extent that the argument is not forfeited, *Dueñas* applies retroactively to cases on direct appeal. (See *Griffith v. Kentucky* (1987) 479 U.S. 314, 328 [“a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past”].)

Dueñas made a prima facie showing of indigence; thus the prosecutor was required to rebut her initial showing with evidence to the contrary in order to prevail.⁸

⁸ Division Seven of the Court of Appeal, Second Appellate District, which authored *Dueñas*, confirmed this interpretation in a later published case. (*People v. Castellano* (2019) 33 Cal.App.5th 485, 490 [“Consistent with *Dueñas*, a defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court”].)

DISPOSITION

We remand the matter for the limited purpose of allowing Ramos to request a hearing to determine his ability to pay the imposed \$30 court facilities assessment (Gov. Code, § 70373), \$40 court operations assessment (§ 1465.8, subd. (a)(1)), and \$300 restitution fine (§ 1202.4, subd. (b)), but otherwise affirm the judgment.

MOOR, J.

I concur:

KIM, J.

BAKER, Acting P. J., Concurring in Part and Dissenting in Part

I join the majority opinion’s discussion and resolution of defendant Martin Ramos’s (defendant’s) evidence suppression argument. I do not join the majority opinion’s disposition of defendant’s *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) claim. I would not reach the merits of the *Dueñas* argument because it is forfeited—and I certainly would not remand the matter solely to permit defendant to make an objection he did not make when sentenced.

The *Dueñas* opinion relies on 1950s, 1970s, and 1980s-era authority to arrive at its constitutional holding, and these cases were old (but good) law at the time of defendant’s sentencing. The majority rightly recognizes *Dueñas* “was rooted in . . . well-established constitutional principles . . .” *Dueñas* itself even characterizes “[t]he principle that a punitive award must be considered in light of the defendant’s financial condition” as “ancient.” (*Dueñas, supra*, 30 Cal.App.5th at p. 1170.) Despite all this well-established constitutional law, defendant made no ability to pay objection in the trial court. The absence of such an objection cannot be excused, particularly when it appears the majority’s only argument for excusing it relies on the terms of the pertinent statutes—terms that must yield to a properly made constitutional objection. (See *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 217 [statutory authority must yield to constitutional command].)

The defendant in *Dueñas* raised in the trial court the argument defendant here makes for the first time on appeal. The difference is dispositive. The argument challenging the trial

court's order to pay \$370 is forfeited. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154-1155 [“*Dueñas* was foreseeable. *Dueñas* herself foresaw it. [¶]. . . [¶] *Dueñas* applied law that was old, not new. We therefore stand by the traditional and prudential virtue of requiring parties to raise an issue in the trial court if they would like appellate review of that issue”].)

BAKER, Acting P. J.